

**OPEN RECORDS AND MEETINGS OPINION
2005-O-03**

DATE ISSUED: February 8, 2005

ISSUED TO: City of Fargo, Garylle B. Stewart, City Attorney

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Matthew Von Pinnon at The Fargo Forum (Forum) asking whether the Fargo City Commission (Commission) violated N.D.C.C. § 44-04-18, the open records law, by not providing records regarding the Commission's Cable Television Review Committee (Committee). Mr. Von Pinnon also asks whether N.D.C.C. § 44-04-19 was violated because meetings of this Committee were not open.

FACTS PRESENTED

The mayor was directed by the Commission at a regular meeting on March 18, 2002, to "appoint staff to review franchise options available for providing cable television service to the community." The mayor appointed the Committee March 22, 2002. Current members of the Committee are City Administrator Pat Zavoral, Executive Assistant Sharon Odegaard, City Attorney Garylle B. Stewart, City Commissioner Mike Williams, IT Director Ron Gronneberg, and City Finance Director Kent Costin.

The Committee has held sporadic meetings since it was created. The Forum requested from the Committee correspondence between Cable One, the current cable TV provider, and the city of Fargo from a three week period detailing the cable provider's requests regarding the pending cable television franchise agreement. The Fargo city attorney responded by letter on behalf of Fargo, stating that the Committee's negotiating sessions with Cable One were not "meetings" because there was no quorum of elected officials. He also stated that any written communications were not open records because they were prepared as part of the negotiation process. November 24, 2004, letter from Garylle B. Stewart to the Forum.

According to the city attorney at its meetings the Committee discusses possible franchise renewal, system upgrades, community needs assessments, and surveys that could be recommended to the full Commission. The city attorney asserts that when representatives

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of the current cable TV provider attend Committee meetings, the Committee is negotiating with the provider as part of the Committee's charge to explore franchise options. The city attorney also states that any report that will be made in the future will be advisory in nature only and will require public discussion and a public vote at the Commission level. No notice has been given and no minutes have been kept of Committee meetings. The last Committee meeting held before this opinion request was made was on November 15, 2004.

ISSUE

Whether the Committee is subject to the open meetings and open records laws.

ANALYSIS

The Commission directed the mayor to appoint staff to review franchise options available for providing cable television service to Fargo. The Committee was formed and has been meeting to address the matters as directed by the Commission. It has been meeting with representatives of the current cable TV provider to negotiate terms of a possible franchise renewal agreement.

Fargo is a public entity. N.D.C.C. § 44-04-17.1(12)(b). Unless otherwise provided by law, meetings of a governing body of a public entity must be open and public notice must be given in advance of all meetings. N.D.C.C. §§ 44-04-19, 44-04-20. While the Commission is the governing body of Fargo "[g]overning body" also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body." N.D.C.C. § 44-04-17.1(6). "As a result, committees created by a public entity's main governing body are also governing bodies subject to the open meetings laws. N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council); N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority)." N.D.A.G. 2005-O-02. See also N.D.A.G. 98-O-13 (announcement at commission meeting by commission chairman that certain of the commissioners would meet with NDIRF constituted delegation to a committee by the commission); N.D.A.G. 96-F-09 (if a public body delegates authority to act on its behalf to a group of its employees, the group assumes the color of a public body because of the delegation of such authority).

Here the Commission directed the mayor to appoint the Committee and authorized the Committee to review cable TV franchise options. Presumably the Commission is expecting some kind of feedback from the Committee. The city attorney indicated that the Committee would eventually make some kind of report or recommendation to the Commission. Thus, the Committee is a governing body subject to the open meetings and records laws and must give public notice of its meetings.

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“Meeting” is defined as “a formal or informal gathering . . . of . . . [a] quorum of the members of the governing body of a public entity regarding public business” N.D.C.C. § 44-04-17.1(8)(a)(1). Public business includes “all matters that relate . . . in any way to . . . any matter over which the public entity has supervision, control, jurisdiction, or advisory power, or [its] use of public funds.” N.D.C.C. § 44-04-17.1(11).

The Fargo city attorney implies that because the Committee has no authority to bind the city to an agreement and will only be making an advisory report to the full city Commission, its gatherings are not “meetings” subject to the open meetings laws. As this office has concluded in several opinions “a committee delegated authority to perform any function, including fact gathering, reporting, or recommending action, as well as taking action, on behalf of a governing body is subject to the state’s open meetings laws, including the requirements to notice its meetings and prepare minutes. See N.D.A.G. 2003-O-15, N.D.A.G. 2003-O-13” N.D.A.G. 2005-O-02 (emphasis in original). Thus, even though the Committee has no binding decision making authority, its gatherings are still meetings subject to the open meetings laws.

Meetings of the governing body of a public entity are open “[e]xcept as otherwise specifically provided by law.” N.D.C.C. § 44-04-19. There is no specific law exempting meetings of the Committee from the open meetings laws.

The city attorney asserts that Committee negotiations are exempt from the open meetings laws. The discussion of negotiating strategy or instructions of a governing body given to its attorney or other negotiators regarding current contract negotiations is confidential. N.D.C.C. § 44-04-19.1(7). An executive session to discuss strategy or instructions may be held for that purpose, but only if discussing the strategy or instructions in an open meeting would adversely affect the bargaining position of the entity. Id. But closure for that limited purpose does not provide a legal basis for closing that part of a meeting during which the actual negotiations are conducted with the other party. N.D.A.G. 2000-O-09 (“[N.D.C.C. § 44-04-19.1(7)] does not authorize an executive session for all contract discussions.”); N.D.A.G. 99-O-01 (“A meeting may not be closed simply because a contract is being discussed.”). Allowing the party with which the city is negotiating to attend the meeting does not protect the bargaining position of the city in its negotiations. N.D.A.G. 2000-O-09. And, even if there was an exemption allowing a portion of a meeting to be closed, the Committee would still be required to give notice of the meetings in accordance with N.D.C.C. § 44-04-20 and close them in accordance with N.D.C.C. § 44-04-19.2.

Thus, meetings of a quorum of the Committee regarding the Fargo cable TV system are subject to the open meetings laws. The Committee is therefore required to give public notice of its meetings and keep minutes of the meetings. N.D.C.C. §§ 44-04-20, 44-04-21(2). Any votes at meetings, if non-procedural, must be roll call votes. N.D.C.C. § 44-04-21(1). Because there is no negotiation exemption from the open meetings laws

applicable to the Committee's meetings, the meetings may not be closed. And, because the Committee is subject to the open meetings and records laws, its records are also open, including the minutes it is required to prepare of its meetings, correspondence it has in its possession, and its other records. Id.; N.D.C.C. §§ 44-04-18, 44-04-21(1), N.D.A.G. 2001-O-11.

CONCLUSION

It is my opinion that the Committee is subject to the open meetings and records laws.

STEPS NEEDED TO REMEDY VIOLATION

The Committee must, in the future, provide proper notice and take minutes of its meetings.

In addition, the Committee must give notice of the November 15, 2004, meeting according to N.D.C.C. § 44-04-20, listing the time, date, location and topics of the meeting. The notice must be posted at the Fargo office and at the meeting location and filed with the city auditor. A copy of the notice must also be given to the official Fargo newspaper and any representative of the news media who has requested notices of Committee meetings. The Committee must also prepare detailed minutes of what transpired at the November 15, 2004, meeting in accordance with N.D.C.C. § 44-04-21(2). The notice issued must also state that a copy of minutes of the November 15, 2004, meeting are available at the Fargo office upon request.

The Committee must also provide to the Forum the records requested, i.e., any correspondence between Cable One and the city of Fargo that details the cable provider's requests regarding the pending cable television franchise agreement.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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